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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 531

UNITED STATES OF AMERICA, APPELLANT

v.

BEN BLUE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court wrote no opinion. The district judge's orally announced decision appears at R. 65–69. The opinion of the court of appeals certifying the appeal to this Court (R. 118–127) is reported at 350 F. 2d 267.

JURISDICTION

Appellee's indictment was dismissed on February 8, 1965. The government filed a notice of appeal to the Court of Appeals for the Ninth Circuit on March 9, 1965 (R. 22–23). On August 16, 1965, the court of appeals granted the government's motion to certify the appeal to this Court on the ground that the decision of the district court sustained a motion in bar

(R. 118–127). Jurisdiction is invoked under 18 U.S.C. 3731.

QUESTIONS PRESENTED

1. Whether the district court's dismissal of the indictment on the ground that appellee had been compelled to incriminate himself in a civil tax proceeding was a decision "sustaining a motion in bar".

2. Whether the district court properly dismissed the indictment against appellee on the ground that he had been compelled to testify against himself in a contemporaneous civil proceeding in which he sought to have tax assessments set aside.

STATUTES INVOLVED

18 U.S.C. 3731 provides, in pertinent part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> * * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

Section 7201 of the Internal Revenue Code of 1954 provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7201.)

Section 7206(1) of the Internal Revenue Code of 1954 provides:

> Any person who—
>
> (1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, which he does not believe to be true and correct as to every material matter * * *
>
> * * * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than 3 years, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7206.)

STATEMENT

A six-count indictment filed in the United States District Court for the Southern District of California charged appellee with wilfully attempting to evade his personal income taxes for the tax years 1958, 1959 and 1960 and with filing false returns for a corporation, Merry-Go-Round, Inc., for the same years in violation of Sections 7201 and 7206(1) of the Internal Revenue Code (R. 1–4). Appellee pleaded not guilty (R. 5) and subsequently moved to dismiss the indictment on the ground that various civil tax proceedings prior to the filing of the indictment rendered a fair trial on the criminal charges impossible and violated appellee's Fourth, Fifth and Sixth Amendment rights (R. 6–12). After a hearing on the motion, the dis-

trict court ordered the indictment dismissed on the ground that appellee "has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself" (R. 66).

The evidence adduced at the hearing showed that in November 1962 appellee's counsel had been advised that consideration was being given to the institution of criminal proceedings against appellee for the years 1958 through 1960 (R. 13). Counsel attended conferences with Internal Revenue Service officials in November 1962 and in March 1963, and on each occasion he was advised that criminal prosecution would be recommended (R. 13–14). On April 9, 1963, a jeopardy assessment against appellee's known assets was issued pursuant to Section 6861 of the Internal Revenue Code of 1954 (R. 33), and on June 6, 1963, statutory notices of deficiencies for each of the tax years involved were issued. These notices gave appellee ninety days in which to file petitions for review in the Tax Court (R. 74–80, 85–92, 102–106).

Appellee filed petitions in the Tax Court to review these deficiencies on July 29, 1963 (R. 39, 42). The petitions verified by appellee[1] preliminarily recited (1) appellee's name and address and the name and address of the corporation, (2) the office at which the returns at issue were filed and the date on which the deficiency notices were mailed, and (3) the deficiencies

[1] One of the four petitions in the record bears only the verification of appellee's wife, on whose behalf alone the petition was filed (R. 92–94). That petition is similar to the ones verified by appellee.

and penalties asserted by the Commissioner of Internal Revenue (R. 70–71, 80–81, 99–100). Each petition then individually enumerated every specific adjustment contained in the underlying deficiency notice and alleged that it was erroneous (R. 71–72, 81–82, 100). The petitions all concluded with allegations repeating, in affirmative form, the specific assertions of error contained in the earlier paragraphs (R. 71–72, 82–84, 101).[2] Appellee was indicted on August 5, 1964 (R. 1).

[2] Appellee's petition with regard to the 1960 tax year is illustrative. Paragraph 4 of the petition reads as follows (R. 100):

> 4. The determination of deficiency and penalties set forth in said deficiency notice are based upon the following errors:
>
> 1960
>
> a. The Commissioner erred in determining that Petitioner received dividend distributions in the amount of $6,571.70 which he did not report on his return for the year 1960.
>
> b. The Commissioner erred in determining that Petitioner received distributions taxable as long term capital gains in the amount of $4,265.01 for the taxable year 1960.
>
> c. The Commissioner erred in disallowing a deduction in the amount of $600 for the use of a separate office in Petitioner's home.
>
> d. The Commissioner erred in determining that all or part of the deficiency for the taxable year 1960 was due to fraud with the intent to evade tax.

Paragraph 5 of the petition reads (R. 101):

> 5. The facts upon which Petitioner relies as a basis of this proceeding are as follows:
>
> a. Petitioner received no dividend distributions which he failed to report on his return.
>
> b. Petitioner received no distributions taxable as long

Appellee argued, *inter alia*, that the effect of the jeopardy assessment and the deficiency notices, issued at a time when criminal prosecution was contemplated, was to compel him "to testify against himself" and "to sign petitions that went to the Tax Court" (R. 27). Appellee's position in this regard was summarized in the following assertion contained in his motion to dismiss (R. 11):

> That by virtue of the assertion of taxes, penalties and interest against the defendant, the filing of income tax liens and the seizure of his assets, the defendant has been compelled to execute statements of fact pertaining to his income tax liabilities for the years 1958 to 1960, inclusive, in pleadings required to be presented to the Tax Court of the United States and to the Internal Revenue Service, thereby compelling this defendant to testify against himself in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

The district court sustained the motion to dismiss on the ground that "when the Government set in motion the jeopardy assessment and the 90-Day Letter which compelled him to come forward within a certain time and file his petition in the Tax Court * * * they foreclosed themselves from proceeding in

---

term capital gains which he failed to report on his return.

c. Expenses deducted for the use of a separate office in Petitioner's home were ordinary and necessary business expense properly deducted on Petitioner's return.

d. No part of the deficiency assessed by the Commissioner for the taxable year 1960 is due to fraud on the Petitioner's part with an intent to evade tax.

the criminal case during that time" (R. 66).[3] The court made this ruling notwithstanding government counsel's representation that the government would not "in any way, offer that petition in the Tax Court or any statement attached to it in evidence against the defendant" (R. 66).[4]

SUMMARY OF ARGUMENT

I

The court of appeals properly certified the case to this Court. The effect of the district court's judgment is forever to bar prosecution for the offense charged on the ground of affirmative matter not appearing on the face of the indictment but alleged by appellee in his motion to dismiss. It follows that this Court has jurisdiction under 18 U.S.C. 3731, which permits a direct appeal to this Court from a "decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy." This clause was enacted in 1907 to authorize an appeal by the government from rulings such as that in *United States v. Armour and Co.*, 142 Fed. 808 (N.D. Ill.), where defendants claimed immunity from prosecution because they had previously testified under subpoena. The decision in this case sustained a "motion in bar"

[3] No separate order dismissing the indictment was entered. The relevant minute order reads, in pertinent part, "* * * indictment dismissed; defendant discharged; bond exonerated" (R. 22).

[4] The court also held that appellee had "not made a sufficient showing as a matter of fact" that the jeopardy assessments so tied up his assets as to make it impossible for him to employ counsel (R. 67).

irrespective whether this Court adopts the construction given that phrase in the opinion of Mr. Justice Brennan in *United States* v. *Mersky*, 361 U.S. 431, 441–442, or the definition stated in the opinion of Mr. Justice Stewart in the *Mersky* case. 361 U.S. at 457.

II

A. The district court erred on the merits because it mistakenly assumed that the Tax Court petitions contained matter which incriminated appellee. An examination of those petitions will disclose, however, that there are no self-incriminatory admissions contained in them; they are merely blanket denials of the allegations made in the deficiency notices. Consequently, there is no factual basis for the district court's conclusion that self-incriminatory statements were improperly obtained as a result of the civil tax proceedings.

B. In any event, if self-incriminatory statements had been obtained, appellee's proper remedy would have been to move to suppress their use as evidence or to exclude them during his criminal trial. The exclusionary rule has become the customary remedy afforded whenever government agents have obtained evidence in violation of a constitutional provision, statute or rule of procedure. There is surely no more reason to invoke the drastic remedy of dismissing an indictment when incriminatory statements have been obtained in the manner claimed here than when a confession is improperly coerced or when evidence is obtained by an unlawful search or seizure. This is not a case in which the accused's trial has necessarily been

rendered unfair by anything done or omitted by government agents. Moreover, the government's conduct was not reprehensible in any way. Government agents took the minimum precautions necessary to insure the collectibility of tax obligations while safeguarding all of appellee's rights.

ARGUMENT

I

THIS COURT HAS APPELLATE JURISDICTION BECAUSE THE DISTRICT COURT SUSTAINED A MOTION IN BAR

This case was certified by the court of appeals to this Court at the government's request pursuant to the concluding provision of 18 U.S.C. 3731 because, in the court of appeals' view, the district court's dismissal of the indictment was a "decision or judgment sustaining a motion in bar" within the meaning of the fourth paragraph of 18 U.S.C. 3731. This determination on the threshold jurisdictional issue was plainly correct.

The meaning of the term "motion in bar" was most recently mooted by Justices of this Court in *United States* v. *Mersky,* 361 U.S. 431, 441–450, wherein two members of the Court (Justices Brennan and Whittaker) expressed the view that a judgment sustaining a motion in bar for purposes of the Criminal Appeals Act is any judgment which "will end the cause and exculpate the defendant." 361 U.S. at 441. Three members of the Court (Justices Frankfurter, Harlan and Stewart) construed the words "motion in bar" as limited to the kind of pleading which had been known to the common law

as a "special plea in bar"[5]—*i.e.*, a "plea in confession and avoidance [which] did not contest the facts alleged in the declaration, but relied on new matter which would deprive those facts of their ordinary legal effect." 361 U.S. at 457.

The judgment being reviewed in this case was a decision sustaining a "motion in bar" under either of these interpretations. The district court held that appellee could never be criminally prosecuted for having evaded taxes in the years 1958 to 1960 because the government, by making it necessary for him to file petitions in the Tax Court, had compelled him to provide self-incriminatory information with regard to the alleged offenses.[6] The defense sustained by the court was, therefore, "in bar of the prosecu-

[5] The Criminal Appeals Act, as enacted in 1907, permitted the government to appeal, *inter alia*, "[f]rom the decision or judgment sustaining a special plea in bar, where the defendant has not been put in jeopardy." 34 Stat. 1246. The words "motion in bar" were substituted for "special plea in bar" in 1948 after the adoption of the Federal Rules of Criminal Procedure which had, in Rule 12, abolished the pleading forms known as special pleas, demurrers and motions to quash.

[6] Although the trial judge said, at one point in the colloquy with government counsel, that the government had "foreclosed themselves from proceeding in the criminal case *during that time*" (R. 66; emphasis added), it seems entirely clear that the court's ruling did not merely suspend the time in which a criminal prosecution could be brought. Having once compelled appellee to come forward, the government would, under the district court's reasoning, necessarily be precluded from ever bringing a criminal prosecution regarding the same matter. As the court of appeals observed, "If the trial court's views are correct, there is no possible way in which the defect in the indictment can be cured, in this case or in any other indictment that may be found" (R. 127).

tion; to sustain it was to end the cause and exculpate the defendants." *United States* v. *Hark,* 320 U.S. 531, 536.

The appellee's motion to dismiss was also a "special plea in bar" in the sense that that phrase was technically construed in 1907. The 1897 edition of *Bouvier's Law Dictionary* states (Vol. 2, at p. 679): "Special pleas in bar admit the facts alleged in the declaration, but avoid the action by matter which the plaintiff would not be bound to prove or dispute in the first instance on the general issue."[7] The 1898 edition of *English's Law Dictionary* defines "special plea in bar" (at p. 739) as "[a] plea in bar which sets up new matter." See also Shipman, *Common Law Pleading* (1923 ed.), pp. 30, 336–337, and authorities cited in Mr. Justice Stewart's dissenting opinion in *United States* v. *Mersky,* 361 U.S. 431, at 457.

The indictment against appellee was dismissed because of "new matter" which he asserted by way of

[7] The following distinction made in the 1897 edition of *Bouvier's Law Dictionary* illustrates that a necessary element of a "special plea in bar," as it was defined at the time of the passage of the Criminal Appeals Act, was the assertion of "new matter" in confession and avoidance (at p. 678; emphasis in the original):

> * * * There is, however, a plea to the action which is not strictly either a general issue or a special plea in bar, and which is called *a special issue*, which denies only some particular *part* of the declaration which goes to the *gist* of the action. It thus, on the one hand, denies *less* than does the general issue, and, on the other hand, is distinguished from a "special plea in bar" in this,—that the latter universally advances *new matter*, upon which the defendant relies for his defence, which a special issue never does; it simply *denies*.

confession and avoidance. It was his contention that irrespective of the truth of the indictment's allegations, he could not be criminally prosecuted because of certain antecedent conduct by the government. In this respect the grounds for the motion in this case are strikingly similar to those asserted and sustained in *United States* v. *Armour & Co.*, 142 Fed. 808 (N.D. Ill.)—the decision which aroused public opinion and prompted the enactment of the provision of the Criminal Appeals Act authorizing government appeals from judgments sustaining special pleas in bar. See Frankfurter & Landis, *The Business of the Supreme Court* (1927), pp. 114–119; *United States* v. *Mersky*, 361 U.S. 431, 447–448, 452 (Frankfurter, J., dissenting). In the *Armour* case, a district judge upheld the contention that the defendants in a Sherman Act prosecution had been immunized against criminal liability by the immunity provisions of the Interstate Commerce Commission Act because of their earlier testimony under subpoena.[8] That case, like the present one, turned on facts which were alleged in confession and avoidance and which barred the prosecution. The defendants there, like the appellee here, maintained that the government had, by its prior conduct, foreclosed a criminal prosecution on matters

[8] That decision was announced during trial, after the presentation of all the evidence. Consequently, the directed judgment of acquittal would not have been appealable even under the subsequently enacted Criminal Appeals Act because jeopardy had attached. However, the contention could have been asserted as a special plea in bar before trial, and it is likely that Congress was intending to prevent future situations in which such a decision, although constitutionally appealable, would be immune from appellate review.

related to the information obtained on the earlier occasion.

United States v. *Hoffman,* 335 U.S. 77, is also an analogous decision. The accused in that case was charged with contempt for having violated a district court injunction prohibiting sales of used cars at over-ceiling prices. He contended that immunity from prosecution had been conferred upon him in the course of an administrative proceeding. The district court sustained the contention and dismissed the rule to show cause. 68 F. Supp. 53 (D.D.C.). An appeal was taken to the court of appeals, which concluded that the district court's judgment amounted to a judgment sustaining a special plea in bar and certified the case to this Court. 161 F. 2d 881 (C.A. D.C.). This Court held that "the appeal was properly brought under the Criminal Appeals Act" (335 U.S. at 79) and reversed the district court's judgment on the merits.

Where, as was true here and in *Hoffman,* the district court's judgment is based upon a defense allegation which goes beyond the four corners of the indictment and where the effect of the judgment, based solely on the new matter asserted by the defendant,[9] is finally to bar criminal prosecution by the United States for the conduct charged in the indictment, the

[9] This limitation would exclude from the statute's reach a situation in which the foreclosure on prosecution is attributable partly to some circumstance other than the matter raised by the defendant. In *United States* v. *Storrs,* 272 U.S. 652, for example, the fact that the statute of limitations would bar reindictment did not change what was otherwise a plea in abatement into a plea in bar.

judgment is one "sustaining a special plea in bar" within the meaning of the 1907 Act. These same characteristics render reviewable in this Court judgments barring prosecutions on grounds that the statute of limitations has run (*United States* v. *Barber*, 219 U.S. 72, *United States* v. *Goldman*, 277 U.S. 229, 236–237), that the facts are *res judicata* (*United States* v. *Oppenheimer*, 242 U.S. 85), that the regulation establishing the defendant's legal obligation has been revoked (*United States* v. *Hark*, 320 U.S. 531), that the defendant's conduct is not subject to the jurisdiction of a federal court (*United States* v. *Celestine*, 215 U.S. 278), and that a constitutional privilege precludes prosecution for the conduct charged (*United States* v. *Murdock*, 284 U.S. 141). In each of the instances cited, as in this case, a defense in the nature of confession and avoidance was sustained by the district court, and the grounds asserted by the accused, in and of themselves, barred any future criminal prosecution by the federal government for the conduct alleged in the indictment.

Finally, we note that it is immaterial that appellee's motion was titled a "motion to dismiss" (R. 6) rather than a "motion in bar" and that the district court's minute entry recited that the indictment was dismissed, not that a motion in bar was sustained (R. 22). The substance of the motion, not its formal title, determines whether an appeal lies to this Court. See *United States* v. *Chambers*, 291 U.S. 217, 221–222; *United States* v. *Storrs*, 272 U.S. 652, 654; *United States* v. *Thompson*, 251 U.S. 407, 412–413;

United States v. *Barber*, 219 U.S. 72, 78. The district court's action was indistinguishable, in any material respect, from a judgment which would historically have been characterized as one "sustaining a special plea in bar." In every realistic sense it "end[ed] the cause and exculpate[d] the defendant." *United States* v. *Hark*, 320 U.S. 531, 536. Consequently, we believe it clear that this Court has appellate jurisdiction under 18 U.S.C. 3731.

II

THE DISTRICT COURT ERRED IN DISMISSING THE INDICTMENT

Turning to the merits of the case, we submit that the district court erred in two respects in dismissing the indictment in which appellee was charged. *First*, the court's judgment was based on the factual misapprehension that appellee "has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself * * *" (R. 66). The deficiency notices and the Tax Court petitions demonstrate, on their face, that appellee was neither required to make self-incriminatory disclosures nor did he make any such disclosures in fact. *Second*, the district court applied the wrong remedy, even assuming *arguendo* that the facts were as it erroneously believed them to be. Had appellee been improperly compelled to make self-incriminatory disclosures, the appropriate remedy would have been to suppress their use—and possibly

the use of their "fruit"—as evidence. Dismissal of the indictment was wholly unwarranted.

In arguing this appeal on these limited grounds we do not intend, of course, to concede that the government is always forbidden to use in a criminal tax prosecution self-incriminatory statements made by a taxpayer in the course of earlier civil tax litigation concerning the same transactions. It is generally the government's policy—as this record shows (R. 59-60)—not to assert civil tax liabilities when criminal proceedings against the taxpayer are contemplated or have been instituted. In exceptional circumstances, however, jeopardy assessments are deemed necessary in order to protect the revenue, and, as a result, civil proceedings may be instituted before the criminal trial is conducted. Whether a taxpayer's verified allegations or testimony in such a civil tax suit (in which he does not invoke a privilege against self-incrimination) may be used against him in a subsequent criminal trial is a question which need not be reached on the facts of this case.[10] This record demonstrates that no incriminatory statements were made, and the relief provided by the district judge was inappropriate no matter how the broader underlying question is resolved.

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[10] This issue is not, of course, limited to tax litigation. In any area which is governmentally regulated through both civil and criminal litigation, a similar problem may arise. Compare, for example, civil and criminal antitrust proceedings or the civil and criminal remedies available in the field of securities regulation.

A. NO SELF-INCRIMINATORY DISCLOSURE WAS MADE BY APPELLEE IN THE CIVIL TAX PROCEEDING

The district court erroneously assumed that appellee was obliged to and did make self-incriminatory disclosures in the Tax Court proceeding in order to preserve his challenge to the Commissioner's assertion of tax deficiencies. In fact, however, no incriminatory admissions were either made or required. The documents filed by appellee in the Tax Court simply denied the allegations made in the deficiency notices and asserted that appellee's challenged tax returns were truthful. The excerpt from one of the Tax Court petitions reprinted in note 2, *supra*, is illustrative of the form which all the petitions took; its contents, we submit, cannot conceivably be incriminatory. They amount to a blanket denial of the allegations made in the deficiency notices and are no more incriminatory than a plea of not guilty to criminal charges.

Neither appellee nor the district court suggested below how the statements made in the Tax Court petitions could be used against appellee in the criminal proceeding. Absent any such showing, the dismissal of the indictment can surely not be sustained on Fifth Amendment grounds. *Boyd* v. *United States*, 116 U.S. 616, on which the district court relied (R. 66), is plainly distinguishable because the material obtained from the taxpayer in that case under compulsion was "to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws * * *." 116 U.S. at 622. But where, as is true here, the information ob-

tained from a taxpayer in the course of a civil proceeding is of no conceivable use "against him"—is, indeed, wholly exculpatory—there is no substance to a Fifth Amendment claim.

B. IF EVIDENCE WAS IMPROPERLY OBTAINED, THE PROPER REMEDY IS NOT TO DISMISS THE INDICTMENT BUT TO EXCLUDE THE EVIDENCE AT APPELLEE'S TRIAL

The unvarying practice in this Court and in lower federal courts with respect to evidence which has been obtained from a criminal defendant in violation of Fourth or Fifth Amendment rights, or in violation of a statute or federal rule of procedure, has been to implement the constitutional protection by an exclusionary rule of evidence. *E.g.*, *Bram* v. *United States*, 168 U.S. 532; *Weeks* v. *United States*, 232 U.S. 383; *Nardone* v. *United States*, 308 U.S. 338; *Mallory* v. *United States*, 354 U.S. 449; *Wong Sun* v. *United States*, 371 U.S. 471. It has never been suggested that official misconduct in obtaining evidence justifies dismissal of an indictment if it is possible to try the accused for the offense alleged without using any evidence which is either directly or derivatively tainted. Consequently, even on its erroneous premise that appellee had been compelled in the civil tax proceeding to make self-incriminatory disclosures, the district court erred in invoking any remedy other than the well established exclusionary rule.

The effect of the district court's ruling is to confer immunity from prosecution on appellee merely because the government took protective steps to insure that his taxes would be collectible if the Commissioner

of Internal Revenue's asserted deficiencies were sustained in an appropriate judicial proceeding. Had government agents coerced a confession from appellee or ransacked his home without a warrant to obtain evidence, appellee would not, under established principles, be entitled to such drastic relief. He could, in such hypothetical circumstances, move under Rule 41(e), F.R. Crim. P., to suppress evidence or object to admission of tainted evidence at his trial. It would be anomalous to grant the more drastic relief of dismissing an indictment and barring prosecution when incriminatory admissions have been obtained by the government for a lawful purpose such as tax collection while limiting redress for coerced confessions to the usual exclusionary rule.

United States v. *Heath,* 260 F. 2d 623 (C.A. 9), on which the district court relied (R. 66), is representative of a totally different situation than that involved here. In *Heath,* government agents had lost a document which was relevant to the accused's defense. Consequently, the court concluded that a fair trial on the charges in the indictment could never be had, and it dismissed the indictment. In *Heath,* as in cases involving excessive pre-indictment delay (see Rule 48(b), F.R. Crim. P.), government misconduct may be said to have rendered a fair trial impossible. But when it is only particular evidence that is allegedly tainted, a defendant may be fairly put to trial on the charges made in the indictment if the impermissible evidence is excluded.

Nor is there any basis for supposing that the allegedly improper evidence infected appellee's indict-

ment. It is well settled that an indictment returned by a legally constituted and unbiased grand jury, valid on its face, is enough to call for a trial of the charge on its merits. *Costello* v. *United States*, 350 U.S. 359. Even if it has been determined that there were violations of an accused's constitutional rights prior to indictment, more than mere suspicion is needed to warrant a judicial investigation into the source of evidence presented to the grand jury. *Lawn* v. *United States*, 355 U.S. 339, 348–350. In the present case appellee laid no foundation and requested no hearing. The court could not presume that improper evidence was presented to the grand jury, and without an evidentiary hearing it had no factual basis on which to dismiss the indictment.

Finally, we note that the government's conduct in this case, even if it had produced self-incriminatory admissions, was not of the kind usually subject to an exclusionary rule. Jeopardy assessments are authorized by law in order to protect the revenue, and government agents took the minimal precautions necessary to that end. The civil proceeding in the Tax Court has been suspended pending the outcome of the criminal trial, and there has been no attempt by government agents to utilize the civil proceeding as a means of eliciting admissions or obtaining discovery of a defense. In short, the government has taken action to protect the revenue while fully safeguarding all appellee's constitutional and statutory rights. There is no basis whatever for penalizing this course of conduct and deterring its repetition by dismissing the indictment against appellee.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed, the indictment reinstated, and the cause remanded for trial on the merits.

Respectfully submitted.

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MARCH 1966.

U.S. GOVERNMENT PRINTING OFFICE:1966